Supreme Court, U.S.
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No. 94 259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES,
NME HOSPITALS, INC. and KEVIN JENKINS, D.O.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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96PP

QUESTIONS PRESENTED

1. Where a black radiologist brings suit against a hospital for terminating his clinical privileges without a hearing, where the trial court grants summary judgment on six causes of action, and where the state appellate court upholds the trial court's grant of summary judgment — although the respondents admit terminating him without a hearing, *no* evidence exists to the contrary and state court's controlling decisions have long held clinical privileges to be fundamental and vested rights and not removable except by a hearing — does that state-action-by-judiciary violate the Fourteenth Amendment's due process and equal protection guarantees?

2. Where the appellate court prior to oral argument issued its "Tentative Opinion" which contained the fiction that no termination occurred and also the fiction that state law requires no hearing, does the appellate court's refusal of petitioner's proffer of corrections of that Tentative Opinion via his Supplementary Letter-Brief, plus the court's 15-minute limit on oral argument, violate due process and equal protection?

3. Does the stifling by summary-judgment of the petitioner's then-pending Motion to Compel Discovery on the race issue, constitute further state action invoking the Fourteenth Amendment's due process and equal protection clause?

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES,
NME HOSPITALS, INC. and KEVIN JENKINS, D.O.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Lawrence F. Brown, M.D.[1] respectfully seeks Certiorari to review the opinion of the California Court of Appeal, Fourth Appellate District, Division Two.

OPINIONS AND ORDERS BELOW

The February 22, 1994, Court of Appeal, Fourth Appellate District, Division Two, opinion is reproduced herein as Appendix A. The March 23, 1994, modification of opinion and denial of petition for rehearing are reproduced herein as Appendix A, pages A-27 and A-28. The May 11, 1994, denial of petition for review by the California Supreme Court is reproduced herein as

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[1] All the parties to this proceeding are listed in the caption of this petition.

Appendix B. The trial court's orders and judgments are reproduced herein as Appendix C.

JURISDICTION

The judgment of the Court of Appeal of California, Fourth Appellate District, was entered on February 22, 1994. The Court of Appeal denied a timely Petition for Rehearing on March 23, 1994. The California Supreme Court denied review on May 11, 1994. This Court has jurisdiction under 28 U.S.C.A. § 1257(a), which jurisdiction petitioner invokes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment of the United States Constitution: Section 1

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Health Care Quality Improvement Act of 1986, 42 U.S.C.A. sections 11111-11152 which in part states:

> The Congress finds [that the] increasing occurrence of medical malpractice and the need to improve the quality of medical care . . . warrant greater efforts than those that can be undertaken by any individual State. [There is an] overriding public concern that the professional review action . . . meets all the standards

> specified[. The physician must be given] adequate notice and hearing procedures [and] such other procedures as are fair to the physician . . . [and the hearing must be held] before an arbitrator mutually acceptable to the physician and the health care entity . . . . In the hearing the physician involved has the right . . . to representation by an attorney . . . of the physician's choice; to have a record made . . . to call, examine, and cross-examine witnesses, [and] to present evidence . . . regardless of its admissibility in a court of law, and . . . receive the written recommendation . . . and written decision . . . . (§ 11112) (Text of 42 U.S.C.A. §§ 11101-11112 appears herein as Appendix D.)

Corporate Bylaws of Respondents: Article VIII, section 7:

> Contract professionals. Any person who has a contractual relationship with this corporation which requires Medical Staff membership and privileges may have such membership or privileges terminated or restricted only in accordance with the hearing and appeals procedures to which he would otherwise be entitled, unless otherwise stated by contract. (Exhibit 10) (CT 1075 line 13 to CT 1076 line 7)

Medical Staff Bylaws of Respondent: Bylaw Article 3.2-3: (CT 1076 lines 8-18)

> A medico-administrative officer [is an officer] with clinical responsibilities, . . . The Medical Staff membership and clinical privileges of any medico-administrative officer shall not be contingent upon his continued occupation of that position . . .

STATEMENT OF THE CASE

Respondents, national hospital chain National Medical Enterprises, Inc., subsidiary corporation NME Hospitals, Inc. dba Doctors Hospital of Montclair, and the said hospital's Chief of Medical Staff Kevin Jenkins, D.O., severed petitioner-radiologist from his set of clinical privileges in radiology and nuclear medicine without cause and without a hearing. Following that expulsion from the Radiology Department, petitioner brought suit, the amended complaint (CT 1-21)[2] alleging six causes of action for the expulsion. The complaint includes counts for acts of termination and nullification of those privileges as follows:

1. breach of fiduciary duty and nullification of the fundamental and vested grant by hospital to physician of clinical privileges,

2. interference with medical specialist's practice of his profession,

3. violation of the California civil rights Unruh Act prohibiting racial discrimination,

4. breach of covenant of good faith and fair dealing based on an implied and oral agreement confirming the bylaw tenuring of the physician,

5. violation of the common law of antitrust of California, and

6. breach of covenant of good faith and fair dealing of an implied and oral post-expulsion agreement falsely promising and assuring petitioner that he would have the replacement committee's "inside track" to his restoration.

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[2] CT refers to the Clerk's Transcript.

Answer was filed. Some discovery ensued. Respondents filed a motion for a protective order; petitioner filed a motion to compel discovery, especially on the issue of race discrimination.

Respondents moved for summary judgment on March 24, 1991. Petitioner filed opposition to all aspects of the motion except to concur that respondents did indeed award successor-Director Dr. Shapiro an exclusive contract. The trial court granted summary judgment, despite and while petitioner awaited the setting of date for hearing the discovery motions by the specially appointed retired judge — and despite plaintiff's pending motion to compel discovery and plaintiff's motion for continuance of the summary judgment hearing. Plaintiff filed notice of appeal on September 9, 1991.

Petitioner is an African American physician who came on staff at the respondent hospital in 1975. He held a full complement of clinical privileges in Radiology and Nuclear Medicine. (CT 1055 lines 9-14, CT 1073 lines 26-27) He began as co-director of the Radiology Department in 1977. At the beginning he was counseled by his co-director, Dr. Robert Sturr, Jr., never to forget that here, you are "a black man in a white man's society." (CT 1072 lines 17-21)

"I had been recommended for the radiology department by Dr. William Filler. It was only after Dr. Filler let his intended retirement be known, that the direct moves were made to oust me and breach my tenure at the hospital." (CT 1074 lines 2-4, CT 1311 lines 12-15)

In the last year before termination appellant's Department was found to have no demerits — a perfect score — by the state's joint hospital accreditation agency. (CT 1073 lines 22-25, CT 1120 lines 15-20) He had never been brought up for corrective action. (CT 1120 lines 6-10) He had led the hospital medical staff's

continuing medical education program for four years. (CT 1073 line 27 to CT 1074 line 1) He had been president of the medical staff and then and thereafter a member of the Medical Executive Committee. (CT 1055 lines 13-16) He was in his third term as a member of the respondent hospital's Board of Governors and was then elected, also, to the further office of Secretary. (CT 1055 lines 16-17)

In 1984, NME's Chief Counsel and Assistant Corporate Secretary Layne for antitrust reasons warned the hospital against conducting a closed medical staff. (CT 1057 lines 3-10).

In 1984 the corporate respondents published the bylaws, parts of which prohibit removal of a physician's privileges except by due and fair processes and for good and sufficient cause. (CT 1074-1080) Corporate Bylaws, Article VIII, Section 7 (CT 1075 lines 15 to CT 1076 line 2). The bylaw specifies that any member physician having a contractual relationship with the corporation may have his clinical privileges terminated or restricted only in accordance with the hearing and appeals procedure, and that the mere expiration of the contractual relationship shall not constitute or permit termination of the privileges. The bylaw also shows that *privileges* refers to clinical privileges. Article 7.2, (CT 1075 line 13 to CT 1076 line 2), Exhibit 30 in Volume Two of Plaintiff's Response to Motion for Summary Judgment.

And the Medical Staff Bylaw Article 3.2-3 bars respondents from using the expiration of a medico-administrative position as a means or basis for canceling existing clinical privileges. (CT 1076 lines 8-18)

Petitioner several times demanded a hearing, e.g., on October 28, 1987 — Minutes of Board of Governors pages 5 and 6 and Appellant's Opening Brief pp. 18-19

— addressing the Board of Governors at its monthly meeting, (CT 1082 line 21 to CT 1088 line 22) and again by letter to Administrator Forrester of December 14, 1987. Each of his demands for a hearing were denied. Respondents' admitted that they permitted no hearing, e.g., on December 15, 1987 in a letter from NME agent and hospital CEO Forrester to petitioner. The letter admitted too that they allowed no proceedings under the bylaws and such had not occurred.

Dated on the same day, December 15, the letter from Vineyard Medical Group to petitioner advised that NME barred him from all radiological services, in-patient and out-patient. Exhibit 26b. (Appendix F herein. CT 1116 line 13 to CT 1117 line 20)

REASONS FOR GRANTING THE WRIT

I.

THE CALIFORNIA COURT OF APPEAL BY VALIDATING THE TERMINATION OF PHYSICIAN-PETITIONER'S CLINICAL PRIVILEGES VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION.

The action of the state appellate court departed from the due process and equal protection clauses and standards of the Fourteenth Amendment contrary to the teachings of *Shelley v. Kraemer*, 334 U.S. 1 (1948), and contrary to the teachings of *Thompson v. Louisville*, 362 U.S. 199 (1960).

The appellate court also violated 42 U.S.C.A. § 1981 *et seq.*, the Health Care Quality Improvement Act of 1986.

This Court in *Shelley v. Kraemer*, 334 U.S. 1 (1948), held the court's enforcement of racially restrictive covenants in real property to be state action in violation of the Fourteenth Amendment.

The Court in relation to cases of the *Shelley* genre has advised that it must determine whether there is state action by "sifting facts and weighing circumstances" on a case by case basis. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Thompson v. Louisville*, 362 U.S. 199 (1960); *Barrows v. Jackson*, 346 U.S. 249 (1953); 48 Colum. L. Rev. 124 (1948); 44 Cal. L. Rev. 718.

In *Thompson, supra,* the Court stated that the ultimate question presented was whether the loitering and disorderly conduct charges against that petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Fourteenth Amendment. The decision on this question "turns not on the sufficiency of the evidence but on whether his conviction rests upon any evidence at all."

The questions here, as in *Shelley*, include whether the acts of the courts below constitute state action violating due process, and, as in *Thompson*, whether the stripping of petitioner's fundamental and vested rights on no evidence at all again violates due process. To both questions the answer should be "yes."

The state can imbue an otherwise private action with state action causing the blend to violate the Constitutional Amendment. As compared to *Shelley*, here the state action entailed its final and judicial reinforcing of the barrier against requital for the previous

destruction of the black physician's career without a hearing.

The effect of that action by the California court was to bring Fourteenth Amendment clauses as well as the petitioner down to defeat. As petitioner believes and as the circumstances show, had respondent not consistently refused to allow discovery on the race issue, he might — see Appendix G — have elicited testimony and secured writings revealing a pattern of near-absence of black radiologists as Department Directors across respondent's nationwide hospital chain. The ouster for racial reasons also connects to the circumstance that petitioner finds no opportunity or situation equivalent to that which respondents confiscated.

In *Shelley* the state's action consisted of the court's support of the racial covenantors; the injunction converted the private discrimination into a federal Constitutional illegality. Here again the state has acted in the enforcement mode. Its court has ratified the hospital's and Jenkins' taking from petitioner his clinical privileges and Department access. Its court has ratified the hospital's denials of the demanded hearing. Here, in other words, the full jury-absent coercive power of government by summary judgment forbade petitioner from securing condemnation of the hospital action. The court solidly has blocked him even from extracting relief by damages. In symbolic terms, the court stopped him from entering Radiology the next morning, picking up the file of the next patient, and resuming his radiology and nuclear medicine practice, whether as director or otherwise, as he had done for an entire decade.

The Court in *Shelley* left no question as to the compelling and onerous gravity of such lower court actions. In *Shelley*, 334 U.S. 1 at 20, this Court held that "when the effect of that action is to deny rights subject to the

protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."

The Court in considering whether to call up this case, might weigh the effect not to do so: such would prejudice vital public welfare concerns by (a) leaving unaffected the no-hearing exclusion of petitioner from the Radiology Department and from vested clinical rights in Fourteenth Amendment equality, property and liberty; (b) removing from the community and from the precious momentum of his career, a physician with skills that are diagnostic in the advanced sense, via radiology and nuclear medicine; (c) in both those fields he was and remains Boarded and across those years vastly practiced; and (d) the termination without hearing or redress removes his role-model impact on young and developing minds.

The appellate court in its opinion (Appendix A, page A2, writes that ". . . plaintiff's hospital privileges were not terminated . . ." and therefore that petitioner has nothing to sue for. Like *Thompson*, there are no facts to support this view; the facts all go in the other direction:

1. Respondents' counsel in introducing respondents' summary judgment motion, stated that ". . . an ad hoc committee of the medical staff was formed for the purpose of recommending to the hospital administration a suitable candidate for the hospital to enter into an exclusive contract with as director of the Radiology Department." (CT 774 lines 11-16, 19-25)

2. Vineyard Medical Group (Pacific physicians Services) which had regularly sent patients to petitioner at the Radiology Department, answering petitioner's letter of November 16, 1987, Exhibit 26a, wrote petitioner on December 15, 1987, Exhibit 26b, that NME'S agent

Forrester informed them that petitioner shall henceforth not receive patients at the Department, because Dr. Shapiro has the contract. (CT 1116 line 8 to CT 1117 line 6) Respondent's counsel Mr. Faber admitted, Jenkins Deposition Vol. I, p. 95, that the letter Exhibit 26b, written by Vineyard to petitioner which advised petitioner that he was barred from handling Vineyard's patient-referrals — accurately stated NME'S position. NME precluded petitioner from all further service at the hospital's Department of Radiology to anyone, whether in-patient or out-patient. (Appendix F)

3. The Chief of the Medical Staff, respondent Dr. Jenkins and respondents' counsel Faber in the Jenkins deposition both stated that petitioner could not perform diagnostic studies, and can't use x-ray equipment and charge for it. (Jenkins, in Deposition Vol. I, pp. 90-91.) Mr. Faber, as counsel, there stated that "He can't perform diagnostic studies." (p. 92) Mr. Faber also stated — referring to the letter of December 15, Exhibit 26b, above, eliminating petitioner from serving both inpatients and outpatients — that ". . . I think the letter set forth the position of the hospital." (p. 95)

4. Respondent Dr. Jenkins, in 1987 the President of the Medical Staff, Deposition Vol. I, pp. 90-92, stated regarding the effect of the exclusive Shapiro contract on petitioner: ". . . as far as I know, its exclusive using the equipment." (pp. 94-95)

5. Respondents' attorney Faber stated during the deposition of deponent-respondent Jenkins, that petitioner does not hold "the right to perform diagnostic studies at hospital, on patients, because he does not have the contract, Shapiro has." (CT 1306 line 25 to CT 1307 line 3)

6. Turning from events of the latter part of 1987: At the beginning of that year, Forrester met with his supervisor the NME regional vice president and told that he was considering replacing petitioner, and the vice-president advised that he consult members of the medical staff if he decided to go ahead. (CT 1055-1069, CT 1066 line 12 to CT 1068 line 4, Deposition of Forrester Vol. I, p. 148) Forrester did so. Dr. Jenkins gathered a "committee" the majority of which were biased even then, against Petitioner. Dr. Jenkins testified that the first meeting of the resulting "radiology committee" occurred in the early summer of 1987, and that the meeting "very probably" occurred before notifying petitioner that his contract would not be renewed. (Jenkins Deposition Vol. I p. 79, CT 1068 lines 5-9; Forrester Deposition Vol. I, p. 125 lines 16-25, CT 1068 lines 5-17) Jenkins and Forrester knew that at least a majority of the group was against petitioner from the start. (CT 1110 lines 1-16; Forrester Deposition Vol. I, p. 144)

The statement of the appellate court, at page 2 of the Opinion (Appendix A-2) that ". . . plaintiff was not entitled to a hearing . . ." is groundless. The law holds that clinical privileges constitute fundamental, vested and tenured property and liberty — which respondents cannot terminate without a due process or common law fairness hearing.

In California a physician has tenure; his privileges are part of his property and liberty and, once granted, become vested and fundamental. A private party which takes them away without grounds and a hearing violates them. *Miller v. Eisenhower Hospital* (1980) 27 Cal.3d 614, 627, n.13; *Ascherman v. Saint Francis Memorial Hosp.* (1975) 45 Cal.App.3d 507, 508 (*Ascherman II*); *Westlake Community Hospital v. the Superior Court* (1976) 17 Cal.3d 465, involves the doctor bringing an

action against a hospital and members of its board, for damage resulting from *hospital revocation of plaintiff's staff privileges and from hospital exclusion of plaintiff from privileges.* Justice Tobriner for the *Westlake* Court wrote, "Recent California decisions establish that before a *public or private* hospital may deny a doctor the right to practice his profession at that hospital, either by the termination of existing staff privileges or by the denial of an initial application for such privileges, the hospital *must* provide a fair procedure which affords the doctor an opportunity to answer the charges upon which his exclusion rests," *id.* at 468, citing *Pinsker I* (1974) and *Ascherman I* (1974). (Emphasis added.)

The list includes other cases which demonstrate the fiduciary duty of the respondents to provide a proper, due process or common law fairness hearing: *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, 815, 823; *Applebaum v. Board of Directors of Barton Hospital* (1980) 104 Cal.App.3d 648, 652, 653, 656-659; and *Ascherman v. Saint Francis Memorial Hospital* (1974) 39 Cal.App.3d 623, 631, 636, 637, 640, 643-644, 648 (*Ascherman I*).

Further, *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146, *rev. denied*, of the instant Fourth Appellate District emphasizes that: the clinical privilege constitutes as vested and fundamental property right. *Volpicelli v. Jared Sidney Torrance Memorial Hospital* (1980) 109 Cal.App.3d 242, 248; and *Rosenblit v. Superior Court (Mountain Valley Hosp.)* (1991) 231 Cal.App.3d 1434.

Petitioner possessed the undeniable right to a hearing.

Allowance of fictions can destroy law. Early uses of fiction as means to impose forfeiture, as in outlawry and corruption of blood, were barred by the Constitution from the outset. Here, however, is a use of fictions to

secure a forfeiture — of a physician's vested property and liberty. The history of advances in the common law importantly involved a reduction of fictions — Carl Joachim Friedrich, "Confiscations," *Encyclopedia of the Social Sciences* (1931) lst ed. vol. 4, pp. 183-187; Blackstone, *Commentaries on the Laws of England*, vol. II, book 4, p. 2625, n.3 (Bancroft-Whitney 1916).

Petitioner invokes a judicial promise made forty-five years ago, when in *Shelley v. Kraemer*, the Court referred to the "obligation of this Court to enforce the constitutional commands." And the Court added at the last page, (*Shelley*, 334 U.S. 1 at 23) "The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly . . . Reversed."

The instant decision rests on fictions. It is also wrong, starting with the ruling that would dethrone the peer review system. The case deserves to see the light of day for it calls up the most paramount fundamental and vested right of the physician, to continue to practice his profession and expand his knowledge and experience by enjoying the law's protection of his fiduciary-tenured privileges.

The rule effectively making the doctor the owner, for life, of his right to practice his privileges, is a right rule. The California courts have breached that rule. The courts below use fictions to perpetrate and confirm a forfeiture.

II.

THE RULING SUBVERTS FEDERAL LAW.

Federal questions decided in conflicting ways can support certiorari, as when state courts of last resort decide federal questions in conflict with the federal statutes or decisions of United States Courts of Appeals, or where an entire tangle of conflicts appears among the courts of the states. Rule 10 of this Court. Thus the instant ruling conflicts with *George Austin, M.D. v. McNamara, et al. and Santa Barbara Hospital*, 979 F.2d 728 (1992) and with the federal standard which it applies, and with rulings of various other states, as well as the Supreme Court of California.

The Court by certiorari takes up decisions of state courts of appeal that defy or conflict with important principles of federal law or with decisions of federal or state courts. Cases listed in the current West's *National Digest System, Decennial Digest*, "Hospitals," key #6 "Management Institutions" show the wide discrepancies among the high courts of the states from each other and the Federal Health Care Quality Improvement Act, 42 U.S.C.A. §§ 11111-11152, Appendix D, and from *Austin* which applies it. The statute enacts and the *Austin* decision recognizes as the national standard the obligation of the hospital to provide peer review where the quality of the physician's medical performance has been challenged (*id.* and § 11102) including when the threat of severance of privileges arises. The elements required in order to satisfy such a process include, e.g., notice of proposed action, notice of hearing, the right to a hearing and the right to an arbitrator "acceptable to the physician and health care entity." The Ninth Circuit in the *Austin* case, and that federal statute, show a federal question.

The instant ruling, which has survived three levels of the California courts, directly conflicts with Federal standards and law — supporting certiorari.

III.

THE APPELLATE COURT REFUSED TO RECOGNIZE, MUCH LESS CONSIDER, PETITIONER'S RESPONSE TO AND CORRECTION OF ITS TENTATIVE OPINION, AND IMPOSSIBLY LIMITED THE TIME FOR ORAL ARGUMENT.

The appellate court issued a "Tentative Opinion to guide counsel in shaping their oral arguments. Petitioner responded by preparing a Supplementary Letter-Brief setting forth the mistakes of fact and errors of law, and requested permission to file it. (Appendix E herein) The court refused and returned petitioner's request and the proffered Supplement. The Court of Appeal also restricted the total time for petitioner's oral argument to fifteen minutes. The court's Tentative Opinion was replete with errors and mistakes requiring petitioner in his proffered 55-page Supplementary Letter-Brief to present corrections. The 15-minute limitation on oral argument, in view of so many misstatements, deprived petitioner of a realistic opportunity to be understood and his corrections considered.

In view of the appellate court's actions, petitioner presented to the California Supreme Court his federal constitutional argument invoking due process and equal protection. For example, on page 8 of said Petition for Review, the petitioner stated:

> Thus, the Court of Appeal here has, through the extension of the fictional reasoning of such

> cases as *Centano* and *Mateo-Woodburn*, enforced Respondent hospital forfeiture of Petitioner's vested property right in his staff privileges without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. *Shelley v. Kraemer* (1948) 334 U.S. 1. As in *Shelley*, Petitioner, a black physician, has asserted that Respondent acted on racial motivation to deprive him of his property rights, and the Court of Appeal here, through its fictional finding that Respondent did not terminate Petitioner's staff privileges, and that Petitioner was not entitled to a hearing, has validated that deprivation.

The court's acceptance of the summary judgment thwarted the ruling on petitioner's motion to compel (CT 280-360) discovery. That acceptance choked off the right of petitioner to conduct and complete discovery on the race issue, which discovery respondents had previously and totally refused.

IV.

ALTHOUGH THE COURT OF APPEAL ORDERED THE OPINION TO BE "NOT FOR PUBLICATION," A DIFFERENT KIND OF PUBLICATION CAN OCCUR.

Even though the appellate court ordered that the decision shall not be published, certainly the ruling will reach the respondents' executives and medical staffs. It will disclose to them, and to others via such grapevine as might extend from them, the way to "white" (Appendix G) and corporate managerial dominance over the physician's rights and physicians' peer review and due

process procedures which federal law and California case law so far requires.

The respondent hospital-chain corporation has a hundred-odd hospitals, spread nationally. Predictably each will become a nodal point from which further publication will occur. The recipients in the hospitals, regions and communities will learn how peer review might henceforth be circumvented.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: August 9, 1994.

Respectfully submitted,

GERALD H. GOTTLIEB

Counsel of Record for
LAWRENCE F. BROWN, M.D.

APPENDIX A

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED
FEB 22, 1994
Court of Appeal
Fourth District

LAWRENCE F. BROWN,
Plaintiff and Appellant,
v.
NATIONAL MEDICAL ENTERPRISES, INC., et al.,
Defendants and Respondents.

E010073
(Super.Ct.No. RCV47045)

OPINION

Appeal from a judgment of the Superior Court of San Bernardino County. William Pitt Hyde, Judge. Affirmed.

Gerald H. Gottlieb, and Robert S. Gerstein, for Plaintiff and Appellant.

Dummit, Faber & Brown, Christopher J. Faber and Dianne E. Timmons, for Defendants and Respondents.

After NME Hospitals, Inc. (NME), dba Doctors' Hospital of Montclair (the hospital) declined to renew its contract with Lawrence Brown, M.D. (plaintiff) to provide radiology services to the hospital, plaintiff filed an action against NME, the hospital, and the president of the hospital's medical staff, alleging: (1) three counts of conspiracy; (2) two counts of breach of the implied covenant of good faith

and fair dealing, and (3) one count of breach of the Unruh Civil Rights Act (Civil Code § 51 et seq). Thereafter, the trial court granted defendants' motion for summary judgment and entered judgment in their favor, leading to this appeal.

Plaintiff contends the court erred in granting the motion because defendants had a fiduciary duty to hold a hearing before terminating his hospital privileges, and because there are many triable issues of material fact related to the termination. However, as we shall show: (1) plaintiff's hospital privileges were not terminated; (2) plaintiff was not entitled to a hearing just because the hospital declined to renew his contract, and (3) plaintiff has not demonstrated that the record presents any triable issues of material fact. We shall affirm the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

On December 1, 1977, plaintiff and Robert Sturr, Jr., M.D. (Sturr) entered into a written agreement with the hospital whereby plaintiff and Sturr agreed to operate the hospital's department of radiology as independent contractors for a period of three years.

On December 1, 1980, after Sturr died, plaintiff entered into a similar agreement with the hospital for an additional five years.

On December 1, 1985, plaintiff entered into a similar agreement with the hospital for another two years. The 1985 agreement, whose non-renewal resulted in the underlying action, provided in relevant part:

"I. OPERATION OF THE DEPARTMENT [of Radiology] . . . [¶] B. Radiologist [Lawrence F. Brown, M.D., Inc.] shall provide full-time professional Radiology services to Hospital's patients upon request of Medical Staff Practitioners. Physician Associated [radiologists employed by Radiologist] shall provide all professional services required from the Department in the normal scope of its and the

hospital's operations. . . . [¶] C. . . . If Radiologist is unable to provide the services of Physician Associates as required hereunder . . ., it shall provide suitable substitute coverage at its own cost to meet the needs of the Hospital's medical staff."

"III. PROFESSIONAL QUALIFICATIONS [¶] A. Each Physician Associate . . . shall at all times maintain appropriate staff membership, privileges and state licensure."

"VI. TERM AND TERMINATION [¶] A. This Agreement shall remain in effect for a term of two years, beginning December 1, 1985, and ending at midnight on November 30, 1987, unless otherwise terminated as provided therein. [¶] B. Either party may terminate this agreement without cause upon ninety (90) days' written notice to the other party . . . ."

"VII. INDEPENDENT CONTRACTOR [¶] Radiologist and its Physician Associates shall perform the services and duties required hereunder as independent contractors practicing a profession and not as employees, agents, or partners of, or joint venturers with, Hospital."

"IX. MISCELLANEOUS [¶] . . . C. This agreement contains the entire agreement of the parties hereto and supersedes all prior agreements, representations, and understandings, whether written or otherwise, between the parties relating to the subject matter thereof. . . . [¶] D. Radiologist shall not . . . suffer any other person (the agents and Associates of Radiologist excepted) to occupy the said premises, or any portion thereof, without the prior written consent of Hospital."

The agreement did not contain any renewal provisions.

The agreement was signed respectively by plaintiff on behalf of Lawrence M. Brown, M.D., Inc., and by Richard J. Forrester, the hospital's chief executive officer (Forrester), on behalf of the hospital.

On August 25, 1987, 95 days before the 1985 agreement was due to expire, Forrester sent plaintiff the following letter

by certified mail: "Dear Dr. Brown: [¶] Please be advised that at this time, according to the Radiology Agreement entered into on December 1, 1985, Doctor's Hospital of Montclair hereby gives you 90-days written notice of its intent to terminate this agreement without cause. [¶] This notice is given in accordance with Section VI, Subsection B, 'either party may terminate this agreement without cause upon ninety (90) days written notice to the other party . . . .' [¶] Doctors' Hospital of Montclair appreciates the service you have provided under the terms of this contract. [¶] Sincerely, [¶] Richard J. Forrester [¶] Chief Executive Officer"

On September 3, 1987, after he received the foregoing letter, plaintiff wrote to the following letter to Forrester: "Dear Mr. Forrester, [¶] I received your notice on September 2 1987 which stated that 'Doctors Hospital of Montclair gives you 90-days written notice to terminate this agreement without cause.' (Radiology agreement) [¶] I love Doctors Hospital of Montclair. I assure you that I want to have my contract renewed. I would like to sit with you and discuss any new recommendations that you may have in mind. As always, I am flexible and open minded. [¶] Kindly let me know when we can meet. [¶] Sincerely yours, [¶] Lawrence F. Brown, M.D."

On September 21, 1987, at a meeting of the hospital's governing board, Forrester told the board that the hospital administration was recommending that the hospital not renew its contract with plaintiff. Forrester said it was the hospital's position that the professional services of the radiology department had fallen behind those of other hospitals in the area. Forrester also said that plaintiff would be allowed to submit a proposal to the hospital for a new contract.

Thereafter, plaintiff and two other radiologists were notified that they could submit bids to provide radiology services to the hospital. The three candidates were interviewed by the radiology subcommittee of the medical staff executive committee. The members of the subcommittee

agreed that plaintiff would not be appropriate and that either of the other candidates "would be a significant improvement" and "appropriate for contracting services."

On October 28, 1987, according to the minutes of the hospital's board, plaintiff, who was a member of the board, "expressed his disapproval to the Board members concerning the fact that his contract had not been renewed. He stated that he felt that the composition of the physician interview panel was unfair because a large number of these physicians sat on the Executive and Governing Boards." Plaintiff moved that the board rescind its recommendation that the hospital not renew its contract with him, and that the recommendation be referred to an independent group of physicians. Both motions died for lack of a second.

On November 16, 1987, plaintiff wrote Dr. Phil Gutierrez, the medical director of the Vineyard Medical Group. The letter recited, in relevant part: "Doctors Hospital of Montclair did not renew my exclusive contract in radiology. However, I am still an active member on the medical staff and I still have my radiology privileges. [¶] I still would like to remain your radiologist at Doctors Hospital."

On November 27, 1987, plaintiff wrote letters to Forrester, to Dr. Kevin Jenkins, the president of the medical staff (Jenkins), and to Fritz Moser, the chairman of the hospital's governing board (Moser) that he, plaintiff, had "engaged legal counsel for the immediate and specific task of attempting, amicably, to persuade your organization to rescind and reverse your recently indicated intention to terminate and sever me from certain connections in the directorship of radiology of [the hospital]."

On December 14, 1987, after plaintiff's contract with the hospital had expired, plaintiff wrote Forrester, Jenkins, Moser, and representatives of NME. The letter recited in relevant part: "[O]n December 1, 1987 you did demand that I vacate and surrender my desk in radiology and you took other actions to remove me from my post and position. [¶] Additionally, I understand that you have taken various

actions which interfer[e] with the exercise of my clinical privileges — though you assure my counsel that my privileges are in[]tact. [¶] Accordingly, I request from you the statement of grounds and reasons for your actions and request the convening of a hearing according to the by-laws whereby such grounds or reasons, if any, will be heard and determined and where[]in I will have full advance opportunity to receive all papers and other documents which might turn out to be material, in order to respond."

The following day, December 15, 1987, Forrester sent plaintiff the following letter by certified mail: "Dear Dr. Brown: [¶] I am writing in response to your letter of December 14, 1987. The Radiology Agreement dated December 1, 1985, between NME Hospitals, Inc. ('NME') doing business as Doctors' Hospital of Montclair and yourself expired November 30, 1985. Additionally, NME provided you with ninety days written notice of its intent not to renew this agreement with you. NME has entered [into] a new agreement for provision of director of radiology services at the hospital which is currently in effect. [¶] *No action has been taken to terminate or restrict your medical staff privileges at [the hospital].* Under the medical staff bylaws at the hospital any such termination or restriction of your medical staff privileges would first require recommendation from the medical staff and final approval by the governing body, none of which has occurred. *I assure you that your medical staff privileges remain fully intact, and no action has been taken to restrict your medical staff privileges.* [¶] Please call me if you have any questions. [¶] Sincerely, [¶] Richard J. Forrester [¶] Chief Executive Officer." (Emphasis added.)

Thereafter, as above noted, plaintiff went to court by filing a complaint against the hospital, Jenkins, and NME (defendants). As amended, the complaint alleged causes of action for: (1) conspiracy and breach of fiduciary duty by wrongful termination; (2) conspiracy and intentional interference with medical practice; (3) violation of the Unruh

Civil Rights Act and of civil justice; (4) tortious breach of the implied covenant of good faith and fair dealing; (5) conspiracy to oust plaintiff from the practice of radiology and nuclear medicine and to restrain and monopolize trade, and (6) post-termination breach of the implied covenant of good faith and fair dealing.

In allegations which were incorporated into all six causes of action, plaintiff alleged that: (1) "[i]n 1977 he became Radiologist and Director of the Department of Radiology" at the hospital; (2) he has been a member of the hospital's staff since 1975 and, until defendants' misconduct, held "the full set of privileges in radiology and relate[d] subjects"; (3) his radiology privileges "embraced all [his] functions . . . as Radiologist and Director of Radiology"; (4) the "rules" which applied to him and to all of the hospital's physicians prohibited termination of his privileges without cause, peer review, and appeal procedures; (5) under the fiduciary relationship between him and defendants and under the hospital's bylaws, he was entitled to a hearing as a precondition to his termination; (6) in the fall of 1987, defendants terminated his medical-clinical privileges and position as director of radiology without complying with his demands as to his procedural and substantive rights; (7) in December 1985 and again approximately a year later defendants impliedly agreed with him that his "position was assured and that his tenure was to extend for an indefinite period subject to termination only for good cause or if [he] voluntarily were to resign"; (8) he is black and defendants conspired to terminate him because of his race; (9) no black physician participated in selecting plaintiff's successor, and (10) no black physician was chosen to replace him.

Plaintiff sought damages for loss of past and future earnings in a sum of over $9,000,000, as well as punitive (exemplary) damages and attorney's fees and costs.

Plaintiff's complaint did not refer to any contract between him and the hospital, and did not include a copy of the hospital's bylaws, or any portion thereof.

Defendants answered the complaint, denying its allegations, and alleging, as a fourth affirmative defense, that "plaintiff's amended complaint herein in its entirety is without merit in law or in fact as defendant and its employees performed all terms and conditions of the written contract with plaintiff."

Then, after extensive discovery and discovery battles, which resulted in the appointment of a referee, defendants noticed a motion for summary judgment.

Defendants' separate statement of undisputed facts in support of the motion recited as follows:

"1. Plaintiff and Hospital entered into an exclusive contract, the purpose of which was for Plaintiff to provide radiology service to the hospital for a specified term of two years terminating November 30, 1987."

"2. As set forth in the contract between Plaintiff and the Hospital, Plaintiff was an independent contractor."

"3. As set forth in the contract between Plaintiff and the Hospital, either party could terminate the contract on ninety days notice *without cause*." (Emphasis in original.)

"4. As set forth in the contract between Plaintiff and the Hospital, the agreement expired pursuant to its terms."

"5. On August 25, 1987, the Chief Executive Officer of the Hospital, Richard J. Forrester, notified Plaintiff in writing that the 1985 Agreement between Dr. Brown and the Hospital would not be renewed after its expiration on November 30, 1987."

"6. [The hospital] exercised its administrative discretion and entered into an exclusive contract for the performance of radiology services with Dr. Shapiro and, subsequently, other physicians."

Facts No. 1 through 4 were supported by the 1985 agreement; fact No. 5 was supported by the agreement and by Forrester's August 25, 1987, letter to plaintiff, *ante*, and fact No. 6 was supported by Forrester's declaration.

Forrester's declaration recited, in relevant part: (1) plaintiff had had the exclusive contract to perform radiology services at the hospital since at least 1977; (2) it is customary to award exclusive contracts to physicians with regard to the operation of the emergency room and the departments of pathology and radiology; (3) in September 1987, the hospital's radiology subcommittee recommended Dr. Shapiro as the best qualified candidate to enter into a contract to serve as the director of the hospital's radiology department; (4) after the hospital's 1985 agreement with plaintiff expired, the hospital entered into an exclusive agreement with Dr. Shapiro, and (5) after the hospital's contract with Dr. Shapiro expired, the contract was not renewed and the hospital entered into an exclusive contract with yet a different physician.

Defendants' motion for summary judgment was set for hearing on April 17, 1991. At plaintiff's request, the hearing was continued to May 8, 1991. At plaintiff's request, the hearing was continued to May 8, 1991, and then to May 15, 1991.

On May 1, 1991, plaintiff filed over 200 pages of materials in opposition to defendants' motion. The opposition included an 80-page separate statement in response to defendants' separate statement of undisputed facts. In the separate statement, plaintiff disputed defendants' Facts No. 1 through 6,

As to defendants' Fact No. 1, that plaintiff and hospital entered into an exclusive contract for plaintiff to provide radiology services to the hospital for a specified term of two years, plaintiff argued that: (1) there was no such contract, because the "1985 document" was not signed by NME; (2) the text of the 1985 document shows it was not exclusive, and (3) the purpose of the 1985 document was not to provide radiological services to the hospital because plaintiff rendered such services under his hospital membership and privileges.

As to defendants' Fact No. 2, that the contract provided that plaintiff was an independent contractor, plaintiff argued: (1) he was a member of the hospital's board of governors and "a Board Member of nearly a decade cannot be deemed an independent contractor"; (2) he did not think of himself as an independent contractor, and (3) NME did "dependent-inducing things" such as supplying radiological equipment and changing the scheduling of his ultrasound technician.

As to defendants' Fact No. 3, that the contract provided that either party could terminate it on 90 days notice without cause, plaintiff argued the proposition was irrelevant, misleading, and disputed, because: (1) the "document" was subordinate to the hospital's bylaws providing that privileges cannot be abridged by the termination or expiration of a service contract, and (2) the document was subordinate to "the implied and orally confirmed agreement of tenure."

As to defendants' Fact No. 4, that the contract expired pursuant to its terms, plaintiff argued that the proposition was irrelevant, misleading, and disputed, "for the reasons stated above."

As to defendants' Fact No. 5, that Forrester notified plaintiff in writing that his contract would not be renewed, plaintiff argued that "[t]here was nothing to renew that was relevant [because] the clinical privileges and post were guaranteed by the implied and orally-confirmed agreement of tenure and by the bylaws."

As to defendants' Fact No. 6, that the hospital exercised its administrative discretion and entered into an exclusive contract with Dr. Shapiro, plaintiff argued that the exclusive contract was an anti-trust violation and therefore not within the hospital's administrative discretion.

Plaintiff's separate statement included nine "facts" which plaintiff contended were disputed. Such facts were:

1. The 1985 agreement was not exclusive.

2. The 1985 "document" could not terminate plaintiff's hospital membership or privileges.

3. The 1985 document was not a contract.

4. Plaintiff was not an independent contractor.

5. Although they received the anti-trust warning, defendants "closed out" plaintiff.

6. The rights recited in the 1985 document "were repetitious recitations of plaintiff's preexisting clinical privileges."

7. "Plaintiff and [NME], through Forrester formed an implied contract based on, e.g. plaintiff's right of tenure, which they confirmed by a parole agreement at the end of 1986. That implied contract and its confirmation clarified or novated any contractual reality *arguendo* possessed by the so[-]called contract of 1985."

8. "The defendants formed a conspiracy to oust the plaintiff . . . from his privileges, his practice, his role as Radiologist and Director of the Radiology Department, and thus from active membership in the hospital."

9. "After sending the edict that his 'contract' would not be renewed . . . defendants and coconspirators represented that the 'committee' consisted of his champions . . . [and] that he was on the selection 'committee's' 'inside track' . . . and . . . led plaintiff to conclude that if he would meet with the 'committee' he would be continued as Radiologist and Director of Radiology; the representation was false, and plaintiff was again rejected."

As supporting evidence for the foregoing "facts," plaintiff referred in general terms to: (1) the 1980 contract; (2) the 1985 contract; (3) answered to interrogatories; (4) deposition testimony; (5) NME's bylaws; (6) the hospital's bylaws; (7) various exhibits, and (7) "[t]he law itself."

For example, plaintiff's supporting evidence for his disputed Fact. No. 7, the alleged implied contract of tenure, recited: "the bylaws of the corporation and of the medical staff showing that plaintiff was entitled to due process rights, the 1980 agreement's Paragraph Nineteen confirming same; the bylaws of the corporation showing that signing of

trust. Cluck reluctantly admitted that he provided less detailed information concerning the financial affairs of the trust to the co-trustees and beneficiaries than he did to appellant. Specifically, Cluck send out two separate letters of information. One letter, three pages long, was sent to appellant detailing appellant's expenditures for the trust and stating that the general expenditures of the trust for the year "consist almost entirely of [appellant's] credit card expenses." The other letter was sent to beneficiaries. That letter, three paragraphs long, was sent to beneficiaries and merely stated the sum total of trust expenditures for the year. Moreover, Cluck testified that he had not segregated bills so appellant's personal work appeared to be work for the trust and, therefore, was billed to the trust. Consequently, the co-trustees and beneficiaries were unable to determine which portions of the bill were for work rendered for appellant and not for the trust.

Clearly, there is more than just some evidence to support the jury's finding that Joe and the beneficiaries did not discover and should not have discovered the facts giving rise to the claim against appellant. Appellant asserts that Joe Carter was a co-trustee and signed reimbursement checks for appellant, thus, creating a presumption of Joe's knowledge of Clyde's expenditures. Moreover, appellant argues that Joe wrote a letter to Clyde on November 10, 1985, which served as evidence of Joe's knowledge as to what Clyde was doing with the trust. Appellant contends that the letter stating that Joe would no longer sign reimbursement checks to Clyde, coupled with Joe's earlier voice of discontentment is evidence of Joe's knowledge of Clyde's handling of the trust,

at least as of November 10, 1985. The letter reads as follows:

> 11, 10 1985
>
> Hi Clyde
>
> Dorise [sic] and Neal Said not to Sing [sic] check for cash Neal Said he thought you have Estate Settle By Jan 15 1986 [sic]
>
> Joe

Explaining why he wrote the letter, Joe testified that he understood from Neal that Clyde was to close the Estate in January 1986, and that Clyde was not providing receipts for the money he was spending from the trust. That evidence does not constitute enough evidence to make the jury's finding against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Cain*, 709 S.W.2d at 176.

Appellant's fifth point of error argument further asserts that the trial judge erred in denying appellant's motion for new trial. The granting or denial of a motion for new trial is addressed to the sound discretion of the trial court and the trial court's action will not be disturbed on appeal absent an abuse of discretion. *Strackbein v. Prewitt*, 671 S.W.2d 37, 39 (Tex. 1984). Since the findings of the jury where based on evidence which was not against the overwhelming weight and preponderance of the evidence, the trial court did not abuse its discretion by denying appellant's motion for new trial. *Strackbein*, 671 S.W.2d at 39. We overrule appellant's fifth point of error.

ACTUAL DAMAGES

Appellant's sixth point of error contends the jury's award of $7 million actual damages is excessive. Claiming there is no evidence to support actual damages in excess of $3,319,747.14, appellant argues the trial court erred in denying appellant's second amended motion for judgment non obstante veredicto and in overruling his motion for new trial. It appears that appellant, through a parenthetic expression within this same no evidence point of error, is also arguing a factual insufficiency point. We first address the no evidence point.

Relying on the current pre-judgment statute, appellant asserts that the judgment awarded $3,681,252.86 in prejudgment interest, but the maximum allowable amount under the statute is $700,122.50. TEX. REV. CIV. STAT. ANN. art. 5069-1.05, § 6 (Vernon 1993).

> **Art. 5069-1.05. Rate of judgments**
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> . . .
>
> Sec. 6. (a) Judgments in wrongful death, personal injury, and property damage cases must include prejudgment interest. Except as provided by Subsections (b), (c), and (d) of this section, prejudgment interest accrues on the amount of the judgment during the period beginning on the 180th day after the date the defendant receives written notice of a claim or on the day the suit is filed, whichever occurs first, and ending on the day preceding the date judgment is rendered.
>
> (b) If judgment for a claimant is less than the amount of a settlement offer by the defendant, prejudgment interest does not accrue on

the amount of the judgment for the period during which the offer may be accepted.

(c) If judgment for a claimant is more than the amount of the settlement offer by the defendant, prejudgment interest does not include prejudgment interest on the amount of the settlement offer for the period during which the offer may be accepted.

(d) In addition to the exceptions provided under Subsections (b) and (c) of this section, the court in its discretion may order that prejudgment interest does or does not accrue during periods of delay in the trial, taking into consideration:

(1) periods of delay caused by a defendant; and

(2) periods of delay caused by a claimant.

(e) In order for a settlement offer to toll the running of prejudgment interest in accordance with the provisions of this section, the offer must be communicated to a party or his attorney or representative writing.

(f) If a settlement offer is made for other than present cash payment at the time of settlement, prejudgment interest on the amount of the settlement offer at the time it is made.

(g) The rate of prejudgment interest shall be the same as the rate of postjudgment interest at the time of judgment and shall be computed as simple interest.

TEX. CIV. PRAC. & REM. CODE ANN. art. 5069-1.05, § 6 (Vernon 1993). While appellant relies on the statutory

limitations for pre-judgment interest, he fails to acknowledge the additional responsibility of a fiduciary.

> Section 114.001. Liability of Trustee to Beneficiary
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> . . .
>
> (c) A trustee who commits a breach of trust is chargeable with any damages resulting from such breach of trust, including but not limited to:
>
> (1) any loss of depreciation in value of the trust estate as a result of the breach of trust;
>
> (2) any profit made by the trustee through the breach of trust; or
>
> (3) any profit that would have accrued to the trust estate if there had been no breach of trust.

TEX. PROP. & CODE ANN. § 114.001(c) (Vernon 1984). Clearly, "any profit that would have accrued to the trust estate if there had been no breach of trust," can mean more than just the statutory prejudgment interest. TEX. REV. CIV. STAT. ANN. art 5069-1.05, § 6 (Vernon 1993). The rate of return on the trust funds, coupled with the safety of those funds, is necessary to calculating what profits the trust funds would have returned in a breach of contract. *See Humane Soc'y of Austin and Travis County v. Austin Nat'l Bank*, 531 S.W. 574, 580 (Tex. 1975).

A loss of profits in trust property, caused by a trustee's breach of fiduciary duty, results in damages in the amount of profit which would have accrued but for the breach. *Slay v. Burnett Trust*, 187 S.W.2d.377, 393 (Tex. 1945); *Langford*, 417 S.W.2d at 445; TEX. CIV. PROP. CODE

ANN. 114.001(c) (Vernon 1984). To hold otherwise, is to allow a trustee who breaches his responsibility to deprive the beneficiaries of the trust profits which could have been made from investments yielding high interest. At the same time the trustee would only be liable for the statutory amount which is currently ten percent. This inequity in trust profits is specifically rejected in the Trust Code. TEX. PROP. CODE ANN. 114.001(c) (Vernon 1984).

In a suit against a trustee for breach of fiduciary duty, interest made from investments is not pre-judgment interest, but an element of damages for the trust's lost use of the money allegedly misappropriated. TEX. PROP. CODE ANN. § 114.001(c) (Vernon 1984); *Holloway v. Int'l Bankers Life Ins. Co.*, 354 S.W.2d 198, 213 (Tex. Civ. App. – Fort Worth 1962), *rev'd on other grounds*, 368 S.W.2d 567 (Tex. 1963). Thus, more than the statutory amount for prejudgment interest can be applicable, as in this case, where a higher than statutory interest of "profit would have accrued to the trust estate if there had been no breach of trust." TEX. PROP. CODE ANN. § 114.001(c) (Vernon 1984).

Appellant argues that there is no evidence to support actual damages in excess of $3,319,7477.14 [sic]. The evidence presented at trial, however, reveals that there was evidence to support the finding of damages of $3,681,252.86 for which the appellant now complains. The evidence presented at trial included: 1) a computer printout of items and interest from 1974 through 1990, 2) evidence of appellant's use of trust funds to pay for personal living expenses, personal legal work, and personal accounting work, 3) evidence that appellant usurped an estate business opportunity netting a profit in

excess of $440,000.00 for himself, 4) evidence that appellant made as high as 13% interest in certificate of deposits from the $440,000.00 profit, 5) evidence that there were not enough funds available after appellant took his $1.45 million in fees and claims, 6) evidence that the prime interest rate on loans during the time period was between 8 percent and 15 and 3/4 percent, and 7) evidence that the expert preparing the summary of the total loss to the estate trust used a reasonable 10 percent factor. Clearly, there was evidence to support the jury's finding. We overrule appellant's sixth point of error.

EXEMPLARY DAMAGES

Appellant's seventh and final point of error contends the exemplary damage award is unconstitutional. Appellant argues that under the Fourteenth Amendment of the United States Constitution and under the due course of law provisions of Article 1, Sections 13 and 19, of the Texas Constitution, the award is infirm. Claiming there is a lack of guidance in jury instructions for exemplary damages, appellant argues that in Texas "the jury's determination is an arbitrary process without any objective standards." *State Farm Mut. Auto. Ins. Co. v. Zubiate,* 808 S.W.2d 590 (Tex. App. – El Paso 1991, writ denied). The appellant claims that because the procedures and methods by which exemplary damages in Jury Question 5 are unconstitutional, the trial court erred in not granting appellant's second amended motion for judgment non obstante veredicto or in not disregarding Question 5.

Appellant's objection to Jury Question 5 was stated in complete as follows: "Question Number 5 is objected

to on the grounds that there are no pleadings or evidence to support the submission of such issue. Further, that legally, exemplary damages should not be awarded under the evidence as presented in this case." Within appellant's objection there is no specific objection as to the unconstitutionality of the jury question for exemplary damages. Yet, on appeal appellant specifically raises the constitutionality issue.

> **Rule 274. Objections and Requests**
>
> A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, **is waived unless specifically included in the objections. . . .**

Tex. R. Civ. P. 274. The purpose of Rule 274 is to provide the trial court with the opportunity to make corrections of errors in the charge. *Castleberry v. Branscum*, 721 S.W.2d 270, 276 (Tex. 1986). When the objections do not clearly state the grounds, the trial court is denied the opportunity to correct the mistake, and the requisites of Rule 274 are not met for appeal purposes. *Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987).

In the present case, the appellant made no constitutional objection to the jury question on exemplary damages to preserve his error. *General Chemical Corp. v. De La Lastra*, 815 S.W.2d 750, 760 (Tex. App. – Corpus Christi 1991, writ granted) (*rev'd in part on other grounds*, 852 S.W.2d 916, 919 (Tex. 1993) (choice of law arguments are waivable)). Consequently, we are unable to review appellant's final point or error, and it is overruled. Tex. R. Civ.

P. 272 and 274. Similarly, appellees David and Anita failed to preserve their point of error. The record before this court does not reveal an objection or a complaint as to the exemplary damage award at any time at the trial level. Because the record does not reveal an objection on the issue, we are unable to address appellees David and Anita's reply point on exemplary damages which has been waived. *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982).

TRUST TERMINATION

David and Anita's cross points assert the trial court erred in overruling their motion for judgment declaring termination of the trust and in overruling their objection to the rendition of the judgment. David and Anita contend that at the time of submission of the case to the jury, all the parties' live pleadings on file pleaded for termination of the trust. If co-appellees wanted to change their pleadings, they could have moved for leave of court to amend their pleadings prior to the entry of judgment. David and Anita argue that it was too late for co-appellees to change their position at the hearing on entry of judgment. As a result, David and Anita objected to the entry of judgment proposed by the co-appellees for the reason that it did not order termination of the trust.

Supporting their argument for termination, David and Anita assert four general reasons for termination of the trust. First, they aver the trust itself stipulates the

terms of termination and those terms have been met.[6] Second, David and Anita contend that to completely deny termination now is not judicially economical. Third, they argue that in light of the appellant's insolvency, it is not inequitable for David and Anita to request an order terminating the trust. Moreover, they claim the duration of the trust was not intended to last until the beneficiaries' disputes and claims against each other were paid.

Co-appellees who initially pleaded for termination argue that their belief that all debts and taxes of the Estate had been paid, a condition precedent, turned out to be incorrect. Even as appellant's pleadings revealed, several claims against the Estate were still pending. Co-appellees further argue that the pleadings simply stated what the parties believed to be true and did not constitute judicial admissions. If the pleadings are contrary to the true state of the facts, they are not held as true legal conclusions or judicial admissions. *See Motor Inv. Co. v. City Hamlin*, 179 S.W.2d 278. 282 (Tex. 1944). The belief that the terms for terminating the trust had been met were erroneous as later reveal [sic] through the evidence.

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[6] The specific termination clause of the trust in question reads:

> This Trust shall terminate upon the expiration of one (1) calendar year following full, final, and complete settlement, payment, satisfaction and discharge of all debts, claims, and taxes, including income, gift and estate and inheritance taxes, and penalties and interest thereon, if any, assessed and asserted against the Estate of HARRY LEE CARTER, Deceased, and/or the Beneficiaries thereof.

A claim against a beneficiary, which was an expressed condition precedent, remained.

The claims that the condition precedents had been met for termination of the trust were not binding. *See Motor Inv. Co.*, 179 S.W.2d a: :82. The evidence presented at trial without objection established the purpose of the trust had not been completely fulfilled. Consequently, the trial court did not error [sic] in refusing to terminate the trust. We overrule appellees David and Anita's cross points on trust termination and their objection to the rendition of the judgment.

Accordingly, we affirm the judgment of trial court.

ORLANDO GARCIA

Justice

DO NOT PUBLISH

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The Honorable Franklin S. Spears
Branton & Hall
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Mr. T. Kellis Dibrell
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515 Busby Drive
San Antonio, TX 78209

Mr. Timothy Bryan Smith
Smith Neal & Karam
Trinity Plaza II
745 E. Mulberry, Suite 490
San Antonio, TX 78212

RE: Case No. D-4587
Style: CLYDE T. CARTER
v. HARRY LEE CARTER ESTATE MANAGEMENT TRUST ET AL.

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK

BY: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 8, 1994

Mr. Michael A. Hatchell
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Smith Neal & Karam
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San Antonio, TX 78212

DISPOSITION

The judgment is affirmed, and it is our view that this case comes perilously close to being a frivolous appeal.

NOT FOR PUBLICATION

/s/ McDaniel
J.*

We concur:

/s/ Ramirez
P. J.

/s/ Dabney
J.

*Retired Associate Justice of the Court of Appeal, Fourth District, senior judge status (Gov. Code, § 75028.1), sitting under assignment by the Chairperson of the Judicial Council.

NOT FOR PUBLICATION

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FILED
MAR 23, 1994
Court of Appeal
Fourth District

LAWRENCE F. BROWN,
Plaintiff and Appellant,
v.
NATIONAL MEDICAL ENTERPRISES, INC., et al.,
Defendants and Respondents.

E010073
(Super.Ct.No. RCV47045)

MODIFICATION OF OPINION AND DENIAL OF PETITION FOR REHEARING

The petition for rehearing is denied. Modification of the opinion heretofore filed in this case on February 22, 1994, is made as follows:

1. On page 17:
line 14, change "his" to "Jenkins' ";
line 22, delete "Faber's or" and change "depositions" to "deposition";
line 24, delete "(but not Faber's)."

2. On page 18:
lines 15-19, delete the sentence "In this separate . . . Dr. Shapiro."

3. On page 29:

lines 5-7, delete the sentence "However . . . *on appeal*";

line 7, delete "Moreover," and change "plaintiff's" to "Plaintiff's";

line 14, after "However," insert "plaintiff"; delete "even . . . unauthenticated";

line 15, omit "version . . . he."

Except for the modification of the language hereinabove set forth, the opinion previously filed remains unchanged.

NOT FOR PUBLICATION

/s/ McDANIEL
J.*

We concur:

/s/ RAMIREZ
P. J.

/s/ DABNEY
J.

*Retired Associate Justice of the Court of Appeal, Fourth District, senior judge status (Gov. Code, § 75028.1), sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX B

FOURTH APPELLATE DISTRICT
DIVISION TWO, No. E010073
S039075

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
MAY 11 1994
Robert Wandruff Clerk

Deputy

LAWRENCE F. BROWN,
Appellant
v.
NATIONAL MEDICAL ENTERPRISES INCORPORATED Et Al.,
Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX C

Dummit, Faber & Brown
Attorneys at Law
11755 Wilshire Boulevard, 15th Floor
Los Angeles, California 90025
Telephones (213) 879-1024
(213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

Received
4 / 6-13-91
Dept / Date
ML
(Initials)

F I L E D - West District
San Bernardino County Clerk
JUN 17 1991
By /s/
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45
ORDER GRANTING SUMMARY JUGMENT

The Motion of Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O., for Summary Judgment or, in the Alternative, Summary Adjudication of Issues, came regularly on before the court on May 15, 1991 in Department RCV "4" of the Superior Court for the County of San Bernardino, the

Honorable William Pitt Hyde, Judge Presiding. Appearing as attorneys were Christopher J. Faber, Esq. of Dummit Faber & Brown, attorneys for Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O., and Gerald Gottlieb, Esq. representing Plaintiff, Lawrence F. Brown, M.D.

After considering the papers filed in support of and in opposition to the motion and after hearing oral argument, the court took the matter under submission and on June 4, 1991, ruled in its Minute Order of that date as follows:

1. That the court finds that the evidence by way of declarations and exhibits filed in support of Defendants' Motion for Summary Judgment establishes that the material facts as set forth in Defendants' Separate Statement of Undisputed Facts are undisputed and that no triable issue of material fact exists warranting trial in this matter as to each cause of action alleged by Plaintiff in support of his action.

IT IS THEREFORE ORDERED that:

1. Defendants' Motion for Summary Judgment be granted.

2. Judgment be entered in favor of Defendants and against Plaintiff, LAWRENCE F. BROWN, M.D.

DATED: JUN 17 1991

/s/ William Pitt Hyde
Judge of the Superior Court

[The Proof of Service form dated 6/11/91 is not included in this appendix.]

Dummit, Faber & Brown
Attorneys at Law
11755 Wilshire Boulevard, 15th Floor
Los Angeles, California 90025
Telephones (213) 879-1024
(213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

Received
4 / 6-13-91
Dept / Date
ML
(Initials)

FILED - West District
San Bernardino County Clerk
JUN 17 1991
By /s/
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45
JUDGMENT ON MOTION
FOR SUMMARY JUGMENT

On June 4, 1991, the court granted the Motion for Summary Judgment of Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O.

IT IS ORDERED THAT:

1. Plaintiff take nothing by way of his Complaint or Amendments thereto.

DATED: 6/17/91

/s/ William Pitt Hyde
Judge of the Superior Court

[The Proof of Service form dated 6/11/91 is not included in this appendix.]

Dummit, Faber & Brown
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11755 Wilshire Boulevard, 15th Floor
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(213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

F I L E D - West District
San Bernardino County Clerk
JUL 10 1991
By Karen Beckler
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45
JUDGMENT ON MOTION
FOR SUMMARY JUDGMENT

On June 4, 1991, the court granted the Motion for Summary Judgment of Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O.

IT IS ORDERED THAT:

1. Plaintiff take nothing by way of his Complaint or Amendments thereto.

DATED: 7/10/91

/s/ William Pitt Hyde
Judge of the Superior Court

[The Proof of Service form dated 7/9/91 is not included in this appendix.]

Dummit, Faber & Brown
Attorneys at Law
11755 Wilshire Boulevard, 15th Floor
Los Angeles, California 90025
Telephones (213) 879-1024
(213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

F I L E D - West District
San Bernardino County Clerk
JUL 10 1991
By Karen Beckler
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45
ORDER GRANTING SUMMARY JUGMENT

The Motion of Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O., for Summary Judgment or, in the Alternative, Summary Adjudication of Issues, came regularly on before the court on May 15, 1991 in Department RCV "4" of the Superior Court for the County of San Bernardino, the

Honorable William Pitt Hyde, Judge Presiding. Appearing as attorneys were Christopher J. Faber, Esq. of Dummit Faber & Brown, attorneys for Defendants, NATIONAL MEDICAL ENTERPRISES, INC., NME HOSPITALS, INC. dba DOCTORS HOSPITAL OF MONTCLAIR and KEVIN JENKINS, D.O., and Gerald Gottlieb, Esq. representing Plaintiff, Lawrence F. Brown, M.D.

After considering the papers filed in support of and in opposition to the motion and after hearing oral argument, the court took the matter under submission and on June 4, 1991, ruled in its Minute Order of that date as follows:

1. That the court finds that the evidence by way of declarations and exhibits filed in support of Defendants' Motion for Summary Judgment establishes that the material facts as set forth in Defendants' Separate Statement of Undisputed Facts are undisputed and that no triable issue of material fact exists warranting trial in this matter as to each cause of action alleged by Plaintiff in support of his action.

IT IS THEREFORE ORDERED that:

1. Defendants' Motion for Summary Judgment be granted.

2. Judgment be entered in favor of Defendants and against Plaintiff, LAWRENCE F. BROWN, M.D.

DATED: 7/10/91

/s/ William Pitt Hyde
Judge of the Superior Court

[The Proof of Service form dated 7/9/91 is not included in this appendix.]

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Attorneys at Law
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Los Angeles, California 90025
Telephones (213) 879-1024; (213) 479-0944
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

FILED - West District
San Bernardino County Clerk
JUL 12 1991
By /s/ Dawn L. Warnock
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

-vs-

NATIONAL MEDICAL ENTERPRISES, INC., DOCTORS HOSPITAL OF MONTCLAIR, INC., KEVIN JENKINS, D.O. DOES I through X, and CORPORATE DOES XI through XX,
Defendants.

Case No. RCV 470-45

NOTICE OF ENTRY OF JUDGMENT

PLEASE TAKE NOTICE that judgment in this case was entered in favor of Defendants on June 17, 1991.

DATED: July 11, 1991

DUMMIT, FABER & BROWN

By: /s/ Christopher J. Faber
Christopher J. Faber
Attorneys for Defendants, National Medical Enterprises, Inc., NME Hospitals, Inc. dba Doctors Hospital of Montclair and Kevin Jenkins, D.O.

APPENDIX D

HEALTH CARE QUALITY IMPROVEMENT ACT OF 1986 [42 U.S.C.A. § 11101 *et seq.*]

Chapter 117 — Encouraging Good Faith Professional Review Acitvities

§ 11101. Findings

The Congress finds the following:

(1) The increasing occurrence of medical malpractice and the need to improve the quality of medical care have become nationwide problems that warrant greater efforts than those that can be undertaken by any individual State.

(2) There is a national need to restrict the ability of incompetent physicians to move from State to State without disclosure or discover of the physician's previous damaging or incompetent performance.

(3) This nationwide problem can be remedied through effective professional peer review.

(4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.

(5) There is an overriding national need to provide incentive and protection for physicians engaging in effective professional peer review.

(Pub.L. 99-660, Title IV, § 402, Nov. 14, 1986, 100 Stat. 3784.)

§ 11111. Professional review

(a) In general

(1) Limitation on damages for professional review actions

If a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all

the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section —

(A) the professional review body,

(B) any person acting as a member or staff to the body,

(C) any person under a contract or other formal agreement with the body, and

(D) any person who participates with or assists the body with respect to the action,

shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action. The preceding sentence shall not apply to damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. and the Civil Rights Acts, 42 U.S.C. 1981 et seq. Nothing in this paragraph shall prevent the United States or any Attorney General of a State from bringing an action, including an action under section 4C of the Clayton Act, 15 U.S.C. § 15C [15 U.S.C.A. § 15c], where such an action is otherwise authorized.

(2) Protection for those providing information to professional review bodies

Notwithstanding any other provision of law, no person (whether as a witness or otherwise) providing information to a professional review body regarding the competence or professional conduct of a physician shall be held, by reason of having provided such information, to be liable in damages under any law of the United States or of any State (or political subdivision thereof) unless such information is false and the person providing it knew that such information was false.

(b) Exception

If the Secretary has reason to believe that a health care entity has failed to report information in accordance with section 11133(a) of this title, the Secretary shall conduct an investigation. If, after providing notice of noncompliance,

an opportunity to correct the noncompliance, and an opportunity for a hearing, the Secretary determines that a health care entity has failed substantially to report information in accordance with section 11133(a) of this title, the Secretary shall publish the name of the entity in the Federal Register. The protections of subsection (a)(1) of this section shall not apply to an entity the name of which is published in the Federal Register under the previous sentence with respect to professional review actions of the entity commenced during the 8-year period beginning 30 days after the date of publication of the name.

(c) Treatment under State laws

(1) Professional review actions taken on or after October 14, 1989

Except as provided in paragraph (2), subsection (a) of this section shall apply to State laws in a State only for professional review actions commenced on or after October 14, 1989.

(2) Exceptions

(A) State early opt-in

Subsection (a) of this section shall apply to State laws in a State for actions commenced before October 14, 1989, if the State by legislation elects such treatment.

(B) Effective date of election

An election under State law is not effective, for purposes of,[1] for actions commenced before the effective date of the State law, which may not be earlier than the date of the enactment of that law.

(Pub.L. 99-660, Title IV, § 411, Nov. 14, 1986, 100 Stat. 3784; Pub.L. 100-177, Title IV, § 402(c), as added Pub.L. 101-239, Title VI, § 6103(e)(6)(A) Dec. 19, 1989, 103 Stat. 2208.)

---

[1] So in original.

§ 11112. Standards for professional review actions

(a) In general

For purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken —

(1) in the reasonable belief that the action was in the furtherance of quality health care,

(2) after a reasonable effort to obtain the facts of the matter,

(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

(b) Adequate notice and hearing

A health care entity is deemed to have met the adequate notice and hearing requirement of subsection (a)(3) of this section with respect to a physician if the following conditions are met (or are waived voluntarily by the physician):

(1) Notice of proposed action

The physician has been given notice stating —

(A)(i) that a professional review action has been proposed to be taken against the physician,

(ii) reasons for the proposed action,

(B)(i) that the physician has the right to request a hearing on the proposed action,

(ii) any time limit (of not less than 30 dayys) within which to request such a hearing, and

(C) a summary of the rights in the hearing under paragraph (3).

(2) Notice of hearing

If a hearing is requested on a timely basis under paragraph (1)(B), the physician involved must be given notice stating —

(A) the place, time, and date, of the hearing, which date shall not be less than 30 days after the date of the notice, and

(B) a list of the witnesses (if any) expected to testify at the hearing on behalf of the professional review body.

(3) Conduct of hearing and notice

If a hearing is requested on a timely basis under paragraph (1)(B) —

(A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity) —

(i) before an arbitrator mutually acceptable to the physician and the health care entity,

(ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or

(iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved;

(B) the right to the hearing may be forfeited if the physician fails, without good cause, to appear;

(C) in the hearing the physician involved has the right —

(i) to representation by an attorney or other person of the physician's choice.

(ii) to have a record made of the proceedings, copies of which may be obtained by the physician upon payment of any reasonable charges associated with the preparation thereof,

(iii) to call, examine, and cross-examine witnesses,

(iv) to present evidence determined to be relevant by the hearing officer, regardless of its admissibility in a court of law, and

(v) to submit a written statement at the close of the hearing; and

(D) upon completion of the hearing, the physician involved has the right —

(i) to receive the written recommendation of the arbitrator, office, or panel, including a statement of the basis for the recommendations, and

(ii) to receive a written decision of the health care entity, including a statement of the basis for the decision.

A professional review body's failure to meet the conditions described in this subsection shall not, it itself, constitute failure to meet the standards of subsection (a)(3) of this section.

(c) Adequate procedures in investigations or health emergencies

For purposes of section 11111(a) of this title, nothing in this section shall be construed as —

(1) requiring the procedures referred to in subsection (a)(3) of this section —

(A) where there is no adverse professional review action taken, or

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

(Pub.L. 99-660, Title IV, § 412, Nov. 14, 1986, 100 Stat. 3785.)

APPENDIX E

GERALD H. GOTTLIEB
Attorney at Law
10933 Wellworth Avenue
Los Angeles, California 90024
Telephone (310) 273-7550
Facsimile (310) 273-7550

The Presiding Justice and Associate Justices,
Court of Appeal, State of California,
Fourth Appellate District, Division Two,
303 West Fifth Street, San Bernardino, CA 92401.
January 10, 1994

Subject: Appeal No. E010073, Lawrence F. Brown, M.D. v. National Medical Enterprises, Inc., et al. — Appeal from Summary Judgment: Motion: Letter requesting Permission to File Supplementary Letter-Brief in Response to the Tentative Opinion; Declaration; Authorities; re-lodging of deposition volumes; request for Judicial Notice of the Exhibits Volume Two of Response to Summary Judgment Motion).

Honorable Presiding Justice and Associate Justices:

With deference, and appreciating the procedure of supplying the Tentative Opinion, appellant believes that a series of misunderstandings beset the instant Tentative Opinion and that the main causes are: (1) the apparent unavailability to this Court of the exhibits of the Exhibits Volume (Volume Two of Plaintiff's Response to the Motion for Summary Judgment) which contains 35 exhibits) and (2) the apparent unavailability of the depositions of defendant Jenkins (Volumes I and II), Forrester (Volume II) and Leyhe (one volume) — even though each of those volumes was respectively lodged and served, and each designated for inclusion in the Clerk's Transcript viz, in the Record on Appeal.

Plaintiff filed Volume Two of his Response to the Motion for Summary Judgment, and lodged all of said deposition volumes with the trial court clerk. Plaintiff designated all for inclusion in the Clerk's Transcript. CT 1469-1476, 1470 & CT 1472-3 (September 16, 1991), and CT 1478 (September 24, 1991) respectively designating:

Item 3, which designates for inclusion in the Clerk's Transcript "The lodged Deposition volumes of depositions of plaintiff (six volumes) Dr. Jenkins (two volumes), Mr. Forrester (two volumes), and Mr. Leyhe (one volume); and Plaintiff's further response to defendants' motion under California Code of Civil Procedure section 2031, and

Item 17 which designates for inclusion in the Transcript "Part Two [i.e., Volume Two, CT 1478], Table of Exhibits, and Exhibits, filed May 1, 1991"

Lodgings are shown at CT 903 (May 1, 1991) and CT 1176 (May 7, 1991).

By these designations, said volumes, of exhibits and of depositions, became parts of the Clerk's Record on Appeal. Rule 4.5 CLERK'S RECORD ON APPEAL — DEFINITION.

The Tentative Opinion indicates that those volumes of the Clerk's Record on Appeal never reached this Court. Therefore appellant on receiving it hastened to provide the deposition volumes all over again, and also prepared the enclosed Supplementary Letter Brief to clear up various misunderstandings. The work has occupied this counsel's full time since receipt of the Tentative Opinion.

Appellant asks the Court to consider the contents of the Letter Brief as grounds for vacating the summary judgment and remanding the case for completion of trial preparation and trial.

Appellant on these grounds moves for an order permitting the enclosures to be lodged and the Letter Brief be filed and received, and judicial notice be taken of the aforesaid location of the Exhibits Volume filed May 1, 1991.

Specifically, Appellant respectfully further requests and moves this Court to take judicial notice under Evidence Code section 452 subsection (h), that Volume Two (Exhibits) Plaintiff's Response to the Motion for Summary Judgment has been and is available to the Court in the Central Court Appeals Division, and that the certified copies or duplicate original of depositions of Forrester (two volumes), Jenkins (two volumes) and Leyhe (one volume) together with a copy, uncertified, of the deposition exhibits volume, are herewith transmitted to and lodged directly with this Court. (Forrester volume I is in Clerk Transcript volume VII.)

The letter-brief consists of 18 PARTS dealing respectively with 18 passages from the Tentative Opinion, of which PART TWO consists of 11 sub-parts. Thus the Letter-brief, of 55 pages plus a declaration and authorities, averages about 2 pages per topic.

Appellant apologizes for the length of the Supplement and requests permission under Rule 15 to exceed the length limit prescribed therein.

Respectfully submitted,

Gerald H. Gottlieb
Attorney for Lawrence F. Brown, M.D.,
Plaintiff and Appellant

Enclosure: Proposed order, Depositions, Letter Brief, Exhibits and compilation of deposition parts and exhibits cited.

APPENDIX F

PACIFIC PHYSICIAN SERVICES

. . . health care you can live with

December 15, 1987

PERSONAL AND CONFIDENTIAL

Dear Dr. Brown:

Thank you for your letter of November 16, 1987 indicating your willingness to continue to provide professional radiology services on behalf of Vineyard Medical Group at Doctors Hospital of Montclair.

I understand from your letter that you remain a staff radiologist at Doctors Hospital of Montclair willing and able to provide services for our group.

Pursuant to your request, Leon Pettijohn of our office has been in touch with Mr. Forrester, Chief Executive Office of Doctors Hospital of Montclair and he has indicated that he would not be able to allow you to provide radiological services on behalf of Vineyard Medical Group for outpatient and inpatient radiological procedures at Doctors Hospital of Montclair. He advised us to contact Dr. Shipiro, the new radiology contractor at the hospital.

Thank you very much for your interest in continuing to be of service to Vineyard Medical Group.

Very cordially yours,

/s/ Ronald D. Lossett

Ronald D. Lossett, PhD., CPA

RDL/cld

c2drbrown

12 North Fifth Street • Redlands, California 92373 • (714) 825-4401

APPENDIX G

The Matter of Race

[Excerpt from Clerk's Transcript, being part of petitioner's sworn (penalty of perjury) Declaration consisting of his Answer to respondents' Interrogatories. As CT 1072-1074, it is part of Petitioner's Response to Respondent's Motion for Summary Judgment]

The Plaintiff is black. The medical staff included a considerable number of black physicians. [Yet no] blacks were on the "committee" which NME's Forrester and Dr. Jenkins selected.

Plaintiff is informed and believes that he is the only physician ever fired from the Doctors' Hospital of Montclair in the history of that hospital (except a certain physician who had lost his license to practice). Plaintiff's ouster was specified to be without cause.

The only physician who was ever made the head of a department and then brought down by another balloting and removed from the chairmanship, was another black physician.

[T]he late Director of Radiology Dr. Sturr, whom plaintiff joined as co-director before the latter's death, stated to plaintiff that he must remember that he is "a black man in a white man's society," referring to the hospital.

Defendants ousted plaintiff, even though he was doubly boarded, in radiology and nuclear medicine. . . .

No black radiologist was interviewed by the "committee," to take plaintiff's place. [NME's Regional Vice President] Leyhe did not raise the question to either Jenkins or Forrester as to why the "committee" did not have among its members a black physician. (Deposition of Leyhe p. 106) Forrester could not recall whether he raised the matter or not:

> Q. Did you consider having a black on the radiology committee?
>
> A. Did I what? A black?

Q. A black physician . . . .

A. I did discuss with Dr. Jenkins who I felt would be appropriate to sit on a committee, but he decided to appoint those members from an executive committee that he had held . . . .

Q. Did you recommend to him or suggest to him that there should be a black physician on the subcommittee?

A. I don't recall whether I made that recommendation." Forrester II, pp. 177-81

Defendants' conduct, of severing plaintiff without cause and not affording him the established rights and procedures prescribed and required by the bylaws including e.g. notice, impartial hearing body, etc., . . . shows plaintiff . . . believes, that defendants were motivated by race prejudice. . . .

As mentioned, his presence and labors had brought him to election to the Presidency and to several terms on the Board, and his Department earned the top rating given by the Joint Commission on Accreditation of Hospitals. His radiological - clinical experience was vast. . . .

The ouster of plaintiff occurred just after the departure of Dr. Filler, the physician who had sponsored plaintiff for the post of Radiologist and Director years before.

Plaintiff is informed and believes that defendants' conduct was mainly or largely motivated by racial prejudice and animus.

Defendants have declined to provide documents or information on the subject of racial patterns pertaining within NME nationally and locally in the selection and retention of black radiologists as heads of departments, and have sought to prevent plaintiff from taking depositions of NME's top officers who would have the authority to bring such documents from any part of the organization — under process which would require them as, e.g., to bring and disclose such documents and information as pertain to that subject. Plaintiff . . . believes that those officers at the

command and policy levels know these racial patterns, of the corporate defendant, and have access to the documentation thereof. These refusals and this resistance raises the inference that the information which said documents and testimony would disclose, would be adverse to the defendants.